Supreme Court, U.S.
FILED

No. 09-1029

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In The
Supreme Court of the United States

JOE NEWTON,

Petitioner,

v.

LARRY NORRIS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether a circuit court errs under this Court's standards for issuing a certificate of appealability when a district court's ruling that a defendant's claim was not cognizable on habeas review was, at the very least, debatable.

TABLE OF CONTENTS

Questions Presented for Review i

Table of Cited Authorities v

Opinions Below 1

Statement of the Basis for Jurisdiction 1

Statutory Provision Involved in This Case 2

Statement of the Case 2

Argument Addressing Reasons for Allowing the Writ 5

The Eighth Circuit's Refusal to Certify Issues for Appeal Conflicts with this Court's Precedent, as the District Court's Ruling that Mr. Newton's Habeas Petition was Barred was, at the Very Least, Debatable. 5

A. The Circuit Courts are Required to Certify Issues for Appeal when the Defendant Demonstrates that the District Court's Decision as to a Constitutional Question was Simply "Debatable." 6

B. The Circuit Courts Differ in Interpreting the Meaning of an "Opportunity for Fully and Fair Litigation" of Fourth Amendment Issues, with the Eighth Circuit Refusing to Look to the State Court Record for Clear Error. 7

C. Under Seventh Circuit Case Law, the District Court would have Reviewed the State Court Record in Mr. Newton's Case and Found that the State Supreme Court Erroneously Applied the Inevitable Discovery Doctrine. 10

D. Because Application of Willett Enabled the District Court to Refuse to Review the State Court Record and Discover the Arkansas Supreme Court's Clear Error and Failure to Correct an Admitted Fourth Amendment Violation, the Ruling Below was Certainly Debatable. 12

Conclusion 13

Appendix

Appendix A: Eighth Circuit Opinion Denying Application for Certificate of Appealability (Nov. 25, 2009) 1a

Appendix B: District Court Order Denying Request for Certificate of Appealability (June 29, 2009) 3a

Appendix C: District Court Memorandum and order Denying Petition under 28 U.S.C. § 2254 (May 28, 2009) 7a

Appendix D: Arkansas Supreme Court Opinion (June 22, 2006) 20a

Appendix E: Trial Court Judgment (Apr. 15, 2005) 28a

TABLE OF CITED AUTHORITIES

Case Law:

Barefoot v. Estelle,
463 U.S. 880, 103 S. Ct. 3383 (1983) 7

Capellan v. Riley,
975 F.2d 67 (2nd Cir. 1992) 10

Keeney v. Tamayo-Reyes,
504 U.S. 1, 112 S. Ct. 1715 (1992) 8

Miller-El v. Cockrell,
537 U.S. 322,
123 S. Ct. 1029 (2003) 6, 7, 12, 13

Nix v. Williams,
467 U.S. 431, 104 S. Ct. 2501 (1984) 11

Palmigiano v. Houle,
618 F.2d 877 (1st Cir.), *cert. denied*, 449 U.S.
901, 101 S. Ct. 272 (1980) 9

Pierson v. O'Leary,
959 F.2d 1385 (7th Cir 1992) 9

Slack v. McDaniel,
529 U.S. 473,
120 S. Ct. 1595 (2000) 6, 7, 12, 13

Stone v. Powell,
428 U.S. 465, 96 S. Ct. 3037 (1976) ..... *passim*

Townsend v. Sain,
372 U.S. 293, 83 S. Ct. 745 (1963) 8, 9

Turentine v. Miller,
80 F.3d 222 (7th Cir. 1996) 8, 9, 10

Weber v. Murphy,
15 F.3d 691 (7th Cir.), *cert. denied*, 511 U.S. 1097, 114 S. Ct. 1865 (1994) 9, 10, 11

Willett v. Lockhart,
37 F.3d 1265 (8th Cir. 1994) 8, 10, 11, 12

Constitution:

Fourth Amendment ..... *passim*

Statutes:

28 U.S.C. § 1254(1) 1
28 U.S.C. § 2253 ..... 1, 12, 13
28 U.S.C. § 2253(c)(2) 2, 6
28 U.S.C. § 2254 ..... 1, 4, 7

Rules:

S. Ct. R. 10 5
S. Ct. R. 10(a) 6
S. Ct. R. 10(c) 6, 13

OPINIONS BELOW

The order of the Ashley County, Arkansas Circuit Court is unreported. The Arkansas Supreme Court's opinion is reported at Newton v. State, 366 Ark. 587, 237 S.W.3d 451 (2006). The orders of the U.S. District Court for the Eastern District of Arkansas denying Joe Newton's petition for writ of habeas corpus under 28 U.S.C. § 2254, Newton v. Norris, 2009 U.S. Dist. LEXIS 44650 (E.D. Ark. May 28, 2009), and denying his request for certificate of appealability, Newton v. Norris, 2009 U.S. Dist. LEXIS 59274 (E.D. Ark. June 29, 2009), are not reported. The Eighth Circuit Court of Appeals's decision denying Mr. Newton's application for certificate of appealability, Newton v. Norris, No. 09-2522 (8th Cir., Nov. 25, 2009), is also unreported.

STATEMENT OF THE BASIS FOR JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 2254, as Mr. Newton timely filed his habeas petition under that statute, noting the state court's rulings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by this Court, and resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Eighth Circuit had jurisdiction under 28 U.S.C. § 2253, as the district court denied Mr. Newton's timely request for certification for appeal. This Court has jurisdiction under 28 U.S.C. § 1254(1), as the Eighth Circuit rendered a final decision on this civil habeas action.

STATUTORY PROVISION INVOLVED IN THIS CASE

> A certificate of appealability may issue * * * only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253(c)(2).

STATEMENT OF THE CASE

In April 2005, an Ashley County, Arkansas jury found Mr. Newton guilty of murder and sentenced him to life imprisonment without parole. On appeal to the Arkansas Supreme Court, Mr. Newton raised one issue—that the trial court had erred in denying his motion to suppress evidence seized from his apartment as a result of a warrantless search.

At the suppression hearing, the trial court had learned the following: Police were called to an apartment complex and had observed a body lying on the concrete. Officers saw that a mat was under the body and that "drag marks" and ran from body to the door of a certain apartment. An officer spotted Mr. Newton looking out of that apartment.

Without a warrant or applicable warrant exception, that officer entered the apartment and watched Mr. Newton while other officers conducted investigation. While in the apartment, the officer observed some broken glass in the living room, and noticed a smell that caused him to think someone had been washing clothes or dishes. Another officer smelled the odor of bleach.

As a result of the investigation, including what officers viewed in the apartment, the police arrested and searched Mr. Newton. The police found a couple of cell phones and a switch-blade knife.

After Mr. Newton was arrested, searched, and placed in a patrol car, yet another officer entered the apartment. The officer could see into the apartment unit through the glass storm door, and that he saw blood on the threshold and on the carpet. Because he saw "what could be blood on the floor inside the storm door," he "went in to check." Inside the apartment, he "just went wherever" he found blood. He found a pair of shoes from the bedroom, rugs from the living room and kitchen, drops of blood in the bathroom, and the smell of bleach throughout the residence. An officer videotaped the inside of the apartment.

The police later obtained a warrant to search the apartment. In obtaining the warrant, however, the police cited evidence they had obtained only after physically entering the apartment and that was not (and could not have been) viewed from outside the apartment. Thus, the later-obtained warrant was only valid if the search of the apartment had been legal in the first place.

In his motion to suppress, Mr. Newton asserted that no exception to the warrant requirement was applicable under the facts of his case. The trial court denied Mr. Newton's motion to suppress, finding that the shoes, rugs and videotape of the scene were taken "under the plain view exception to the Fourth Amendment's warrant requirements."

On appeal to the Arkansas Supreme Court, Mr. Newton noted that the trial court had erred in using the "plan view" exception to the warrant requirement because the officers only obtained the evidence, such as the shoes, rug, and videotape, after *physically entering* the apartment. Briefing focused on the facts and law as to the plain view exception.

The state's highest court agreed that the trial court's reliance upon the plain view doctrine was troubling and concerning in light of the facts of the case. But that Arkansas Supreme Court nevertheless affirmed the trial court, pointing to a different legal theory—inevitable discovery. The court concluded that, "even if police had not illegally entered Newton's apartment, they would have later entered under a valid search warrant and inevitably discovered the alleged tainted evidence."

But just like the police had done in later obtaining a warrant, the Arkansas Supreme Court cited evidence and facts only known to police because they had illegally entered the apartment. Thus, Mr. Newton timely filed a petition for writ of habeas corpus under 28 U.S.C. § 2254.

In the petition, Mr. Newton argued that the Arkansas Supreme Court reached a decision that was contrary to, or an unreasonable application of, federal law concerning inevitable discovery and had reached a decision that was based upon an unreasonable determination of the facts. The core argument was that the state's highest court had wrongly applied the inevitable discovery doctrine. The Arkansas Supreme Court's decision expressly cited evidence police had illegally obtained *during* the search and, thus, under

this Court's precedent, could not be used to support the inevitable discovery doctrine.

The district court denied the petition on the grounds that Mr. Newton had an opportunity for full and fair litigation of his Fourth Amendment claims in state court. Mr. Newton appealed to the Eighth Circuit Court of Appeals.

Mr. Newton submitted that the district court's ruling had been at least debatable. After all, briefing to the Arkansas Supreme Court had focused on the facts and law relevant to the plain view exception to the warrant requirement, while the state's highest court had summarily affirmed based upon (incorrect) application of the inevitable discovery doctrine. Accordingly, the state supreme court's error had not been fully or fairly litigated. Instead, it was an eleventh-hour ruling on a surprise ground, and it was wrong. The Eighth Circuit disagreed, and denied Mr. Newton's application for a certificate of appealability.

Mr. Newton now timely petitions this Court for review. He remains incarcerated.

ARGUMENT ADDRESSING REASONS FOR ALLOWING THE WRIT

The Eighth Circuit's Refusal to Certify Issues for Appeal Conflicts with this Court's Precedent, as the District Court's Ruling that Mr. Newton's Habeas Petition was Barred was, at the Very Least, Debatable.

Under Supreme Court Rule 10, the Court will review an important question of federal law that

conflicts with relevant decisions of this Court. S. Ct. R. 10(c). The Court will also review a decision of a circuit court if it that decision is in conflict with the decision of another circuit on the same important matter. S. Ct. R. 10(a).

In this case, the Eighth Circuit's decision conflicts with this Court's decisions in Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029 (2003), and Slack v. McDaniel, 529 U.S. 473, 120 S. Ct. 1595 (2000), as the district court's ruling that Mr. Newton's habeas petition was not cognizable was, at the very least, debatable. In turn, the district court's decision was debatable because it applied the Eighth Circuit's questionable interpretation of this Court's decision in Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037 (1976)—an interpretation that conflicts with the views of sister circuit courts and broadly precludes federal habeas review of state court rulings that are clearly erroneous based upon the state court's own record.

A. The Circuit Courts are Required to Certify Issues for Appeal when the Defendant Demonstrates that the District Court's Decision as to a Constitutional Question was Simply "Debatable."

To demonstrate that the issuance of a certificate of appealability is appropriate, a defendant need only make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). An applicant has made a "substantial showing" where "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to

proceed further.'" Slack, 529 U.S. at 484 (quoting Barefoot v. Estelle, 463 U.S. 880, 893 & n.4, 103 S. Ct. 3383 (1983)).

The question for a circuit court reviewing a habeas petitioner's appeal is not whether the petitioner's argument will ultimately succeed. The question is simply whether the district court's ruling was debatable. In Miller-El, the state had argued that a circuit court had rightfully denied an application for certificate of appealability because the petitioner was not going to be able to win the appeal on the merits. The Court responded, "That may or may not be the case. It is not, however, the question before us." Id. Instead, the "inquiry asks only if the District Court's decision *was debatable*." Id. (emphasis added).

B. The Circuit Courts Differ in Interpreting the Meaning of an "Opportunity for Fully and Fair Litigation" of Fourth Amendment Issues, with the Eighth Circuit Refusing to Look to the State Court Record for Clear Error.

In Stone v. Powell, the Court established a general rule that criminal defendants may not seek collateral review of Fourth Amendment exclusionary rule claims under 28 U.S.C. § 2254 if they received "an opportunity for full and fair litigation of" their Fourth Amendment claims in state court. Id. at 494. The Stone Court based its decision on a concern for judicial economy, stating that the "justification [for the exclusionary rule] becomes minimal where * * * a prisoner * * * previously has been afforded the opportunity for full and fair consideration of his

search-and-seizure claim at trial and on direct review." Id. at 486.

The Court has not elaborated on the meaning of an "opportunity for full and fair litigation." Willett v. Lockhart, 37 F.3d 1265, 1270 (8th Cir. 1994) (en banc); Turentine v. Miller, 80 F.3d 222, 224 (7th Cir. 1996). But the Stone Court's opinion provided some clues as to its meaning.

After referring to an "opportunity for full and fair litigation," the Stone Court cited Townsend v. Sain, 372 U.S. 293, 83 S. Ct. 745 (1963). In Townsend, the Court discussed when an evidentiary hearing is necessary in a federal habeas corpus proceeding.[1] One circumstance where an evidentiary hearing is necessary is when "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing." Id. at 313. The Townsend Court found that "there cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant." Id. at 313-14. "No relevant findings have been made unless the state court decided the constitutional claim tendered by the defendant on the merits." Id. at 314.

Pointing to Townsend, the Seventh Circuit narrowly interprets Stone as barring claims if the petitioner simply argues that the state court made a

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[1] The Court overruled a different aspect of the Townsend opinion in Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S. Ct. 1715 (1992).

mistake in applying Fourth Amendment law.[2] Turentine, 80 F.3d at 226; Pierson v. O'Leary, 959 F.2d 1385, 1392 (7th Cir 1992). Under Weber v. Murphy, 15 F.3d 691 (7th Cir.), *cert. denied*, 511 U.S. 1097, 114 S. Ct. 1865 (1994), to determine whether a federal habeas petitioner has received a full and fair opportunity to litigate his Fourth Amendment claim, the Seventh Circuit first looks to whether the petitioner "clearly informed the state court of the factual basis for the claim" and "argued that those facts constitute" the constitutional error. Id. at 694. If so, the Seventh Circuit looks to the state court record and considers whether "the state court has carefully and thoroughly analyzed the facts and * * * applied the proper constitutional case law." Id. If not, the petitioner had not received a full and fair opportunity to litigation the Fourth Amendment error, and Stone does not bar review. Turentine, 80 F.2d at 224-25.

With this standard, the Seventh Circuit has "sought to explicate what the Supreme Court recognized in Stone as a very narrow exception to the general rule that a habeas petition may not bring Fourth Amendment claims." Id. at 226. That exception allows "habeas review of Fourth Amendment claims" in "instances where the state court made an egregious error (e.g., failed to apply Supreme Court precedent directly on point after the argument was clearly presented), thus effectively depriving the petitioner of

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[2] At least one circuit beside the Eighth Circuit has found that Stone did not necessarily intend to incorporate the full extent of the Townsend Court's definition of full and fair hearing. See Palmigiano v. Houle, 618 F.2d 877, 881 (1st Cir.), *cert. denied*, 449 U.S. 901, 101 S. Ct. 272 (1980).

the ability to vindicate his federal rights in state court." Id.

The Eighth Circuit has adopted a stricter standard, interpreting Stone to hold that federal courts should not review Fourth Amendment claims raised in § 2254 petitions unless the defendant was prevented from litigating his claims in state court "because of an unconscionable breakdown in the underlying [state judicial] process." Willett, 37 F.3d at 1271 (quoting Capellan v. Riley, 975 F.2d 67, 70 (2nd Cir. 1992)). And as the district court in this case noted below, the Eighth Circuit directs its district courts "not to consider whether full and fair litigation of the claims *in fact* occurred." Willett, 37 F.3d at 1273 (emphasis in original). Citing Willett, the district court below noted it had been directed "to abstain from reviewing the record to determine whether the" Arkansas Supreme Court's "findings of fact are supported by the record."

C. Under Seventh Circuit Case Law, the District Court would have Reviewed the State Court Record in Mr. Newton's Case and Found that the State Supreme Court Erroneously Applied the Inevitable Discovery Doctrine.

Application of the Eighth Circuit's Willett view of Stone in this case, rather than the Seventh Circuit's Weber, made a tremendous difference in this case. Had the district court applied Weber, it would have reviewed the record and found that the state courts' findings of fact were not supported by the record, thereby removing the Arkansas Supreme Court's foundation for affirming what was otherwise an admitted Fourth Amendment violation.

Mr. Newton had raised a strong meritorious claim that the trial court had wrongly denied his motion to suppress, as the police had illegally entered his apartment, and the trial court had wrongly applied the plain view exception to allow introduction of the illegally-obtained evidence at trial. The Supreme Court of Arkansas ruled that the trial court had erred by applying the plain view exception in the case. Rather than remand, the state's high court affirmed by concluding that the police would have discovered the evidence through the later-obtained warrant.

The problem was that the inevitable discovery doctrine could not apply as the Arkansas Supreme Court suggested. The facts to which the court pointed were facts that the police discovered only after illegally entering the apartment and, thus, those facts could not have been legally cited in support of the later-obtained warrant. Under Weber, the district court would have found that Mr. Newton had clearly argued in the state courts that, under the facts of his case, the plain view doctrine did not apply, and that his Fourth Amendment rights had been violated. See Weber, 15 F.3d at 694.

The district court then would have looked to the state court record to see whether the Arkansas Supreme Court carefully and thoroughly analyzed the facts and applied the proper constitutional case law. See id. The district court would have found that the Arkansas Supreme Court wrongly applied Nix v. Williams, 467 U.S. 431, 104 S. Ct. 2501 (1984), to the facts of the case. Unfortunately, applying Willett, the district court could refuse to review the state court record and, instead, summarily conclude that Mr. Newton's claim was not cognizable.

D. Because Application of Willett Enabled the District Court to Refuse to Review the State Court Record and Discover the Arkansas Supreme Court's Clear Error and Failure to Correct an Admitted Fourth Amendment Violation, the Ruling Below was Certainly Debatable.

In this case, the Arkansas Supreme Court recognized that a Fourth Amendment error had occurred, and that the trial court had wrongly applied the plain view doctrine. The district court below appeared to recognize that the Arkansas Supreme Court wrongly applied the inevitable discovery doctrine to ignore those errors. But citing Willet, the district court was able to sweep these acknowledged errors under the rug.

On appeal to the Eighth Circuit, Mr. Newton challenged the district court's conclusion that he had an opportunity for full and fair litigation of the claims. He expressly noted that the state court record supported his claims that the Arkansas Supreme Court erred in applying Nix and the inevitable discovery doctrine. Thus, he submitted, the district court's decision was at least debatable.

Because the Eighth Circuit refused to accept this debatable issue for appeal and, instead, considered whether it would have ultimately granted relief under its interpretation of Stone, the court of appeals erred under the Court's decisions in Slack and Miller-El. Mr. Newton notes that the Eighth Circuit's judgment did not cite the standards of § 2253, Slack, or Miller-El. Thus, by refusing to certify the matter for appeal, the Eighth Circuit has held Mr. Newton to a higher

standard that allowable under § 2253, Slack and Miller-El. For these reasons, Mr. Newton asks the Court to grant his petition under Supreme Court Rule 10(c) and either order full briefing or remand the matter to the Eighth Circuit with instructions that the court of appeals certify the issue for full briefing on appeal.

CONCLUSION

Petitioner Joe Newton submits that his petition for writ of certiorari should be granted for the compelling reasons noted above, including that the Eighth Circuit's decision conflicts with this Court's precedent and that the underlying Eighth Circuit case law conflicts with case law of other circuits on the application of Stone v. Powell. Mr. Newton respectfully asks the Court to order full briefing or remand the matter to the Eighth Circuit with instructions to certify his substantive issues for appeal.

Respectfully submitted,

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